2010 WL 1746685 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

In the Matter of the Guardianship of: John Joseph BORTKA, II.
John Jerald Bortka, Appellant,
v.
Paula Bortka Wells, Appellee.

No. 88A01-0907-CV-343.
March 9, 2010.

Appeal from the Washington County Circuit Court, Trial court Cause
No. 88C01-0606-GU-10, The Honorable Roger L. Duvall, Special Judge

Appellee's Brief

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i *TABLE OF CONTENTS

ii *TABLE OF AUTHORITIES

CASES

*1 *STATEMENT OF THE ISSUES*

The Appellant's Statement of the Issues identities two issues for appeal, not one as stated by the Appellant. That being said, the issues can be clarified and placed into two categories:

1. Whether or not the trial court **abused** its discretion in its Order of June 16, 2009 by requiring the Appellant, John Jerald Bortka ("Jerry"), to reimburse the guardianship account in the amount of $12,034.00; and

2. Whether the trial court **abused** its discretion by ordering the Appellant, Jerry Bortka, to pay attorneys fees in the amount of $2,000.00, incurred by Appellee, Paula Bortka Wells ("Paula"), as a sanction for the court's finding Jerry Bortka in contempt for failing to provide an accounting within the time Ordered by the Court.

STATEMENT OF THE CASE

The course of proceedings as Appellant has stated them is correct; however, the Appellee contends that there are additional proceedings that the Appellant failed to bring to this Court's attention and as a result Appellee provides her Statement of the Case as follows.

This is an appeal of the trial court's order concerning a guardianship that has been in effect since June 7, 2006 for the purpose of protecting the person and estate of the ward, John Joseph Bortka II ("John"). At different times throughout this guardianship both John's mother (Paula) and father (Jerry) have individually served as guardian over John's person and estate.

This subject appeal is brought by Jerry as a result of his dissatisfaction with the Trial court's June 16, 2009 Order that requires him to reimburse the guardianship account the sum of SI 2,034.00 and affirms the Trial court's prior Order of July 17, 2008 requiring him to pay Paula $2,000.00 for attorneys fee as a sanction for Jerry's contempt of court.

***2** Paula was granted guardianship over John's person and estate on June 7, 2006. (Appellant's App. p. I; Appellee's App. p. 1). On February 21, 2007, Jerry was named guardian of John and the Court ordered Jerry to provide an accounting every 60 days. (Id.) Jerry did not provide accountings in sixty day intervals as ordered. (Appellee's App. p. 2). Subsequent hearings were conducted on June 6, 2007 and August 15, 2007. (Appellant's App. p. 4; Appellee's App. p. 2). On July 5, 2007 Paula filed a Petition for contempt and attorneys fees with the court. (Appellant's App. p. 4). A hearing on these issues was held on August 15, 2007 in which the Court ordered Jerry to submit an accounting to the Court in writing. (Appellee's App. p. 2). The initial accounting was incomplete and supplemented on May 28, 2008. (Appellee's App. p. 2).

A hearing was held on all matters pending on May 21, 2008, which resulted in the Trial court's Order of July 17, 2008. (Appellee's App. p. 1). Jerry filed Motion to Correct Errors on August 18, 2008, in which Paula filed a response on September 2, 2008.

(Appellant's App. pp. 5, 6). The Court denied the Motion to Correct Errors in part and modified the judgment of the Court in part by order dated September 23, 2008. (Appellant's App. p. 7). Jerry filed a Motion to Set Aside Order on Motion to Correct Errors and to Request Final Evidentiary Hearing on September 25, 2008. (Id.). This Motion was treated by the Court as a Motion for Relief from Judgment or Order under Rule 60 of the Indiana Rules of Trial Procedure. (Id.). This Motion was heard during a hearing held on May 5, 2009. (Id.). On June 16, 2009 the Trial court entered an Order from which this subject appeal follows.

*3 *STATEMENT OF FACTS*

Appellee generally agrees with the Appellant's Statement of the Facts. However, Appellee provides a more detailed statement of facts in an effort to apprise this Appellate Court of all important underlying facts of this case.

The subject guardianship began on June 7, 2006 for the purpose of protecting the person and estate of the ward, John, an adult male who was injured in an automobile accident and suffered from many injuries--including a diagnosis of traumatic brain injury. (Appellant's App. p. 29). As a result of the auto accident in 2006, John was in a coma for a period of time and received extensive treatment for his traumatic brain injury. (Appellant's App. p. 29). Paula was named the initial guardian of both the person and estate of John, whereas Jerry took over as guardian for John in early 2007.

In its Order of June 16, 2009, the Trial court determined that it is undisputed that the guardianship bank account while under the supervision of Jerry as guardian, expended $31,049.30 in a five and one-half (5 1/2) month period. (Appellant's App. pp. 8, 153-267). This fact has not been disputed. The Court upon receiving evidence from the parties, determined that Jerry was responsible for a monetary amount based upon four issues that were extensively addressed in its Order of July 17, 2008. (Appellee's App. pp. 1-4; Appellant's App. p. 7, ¶ 5). Three of the areas represented actual reductions to the guardianship bank account, and the fourth is the issue of the uninsured automobile and its value. (Id.).

The Court determined that funds had not made it into the guardianship estate once received by Jerry from Paula totaling $2,100.00; there were many unsupervised and unaccounted for expenditures that Jerry allowed the ward to personally withdraw from the estate totaling $5,600.00; bank overdraft charges in the amount of $334.00; and Jerry's failure to maintain ***4** insurance of the ward's vehicle that was totally destroyed in an accident--which resulted in a loss in the vehicle's value to the guardianship estate totaling $4,000.00. (Appellant's App. p. 8). The trial court ordered that Jerry reimburse the guardianship estate $12,034.00 due to his failure to uphold his duties as guardian over his son's person and estate. (June 16, 2009 Order). This $4,000.00 valuation of the uninsured vehicle was the sole modification that the Court made to its prior Order of July 17, 2008 based upon additional evidence presented by Jerry alleging the vehicle's value, as of the date of the May 5, 2009 hearing, was $1,150.00. The Trial made an adjustment to the vehicle's value reducing it from its original finding of $8,000.00 to 54,000.00 as the loss to the guardianship due to Jerry's failure to insure the vehicle. (Appellant's App. p. 8,

The Trial court did not alter its earlier Order of July 17, 2008 finding Jerry in contempt and ordering Jerry to pay $2,000.00 of Paula's attorneys fees as a result of Paul having to initiate proceedings against Jerry for failing to provide an accounting as ordered by the court--which also resulted in the trial court's ordering Jerry in contempt. (Appellant's App. p. 8, ¶¶ 10, 11).

SUMMARY OF ARGUMENT

The trial court's findings of fact and conclusions of law and order were properly supported by the evidence before the court and were clear of error. In so far as the original findings of fact concerning the subject vehicle's value was improper, they were properly rectified by the court's June 16, 2009 Order after it received further evidence as to the vehicle's valuation during the May 5, 2009 evidentiary hearing. The court stated in his original July 17, 2008 Order and again it its June 16, 2009 Order that it reviewed the accountings prepared by Paula and Jerry thoroughly to determine whether the funds given to Jerry by Paula could be accounted for. (Appellee's App. pp. 1-4; July 17, 2008 Order; June 16, 2009 Order). The trial court did not ***5** **abuse** its discretion by determining the amount of funds that Jerry should return to the guardianship account, or his discretion to award Jerry to pay $2,000.00 towards Paula's attorneys fees.

STANDARD OF REVIEW

All findings and orders of the trial court in guardianship proceedings are within the trial court's discretion. I.C. § 29-3-2-4; *E.N. ex rel. Nesbitt v. Rising Sun-Ohio County Community Sch. Corp.*, 720 N.E.2d 447, 450 (Ind. Ct. App. 1999). Thus, these findings are reviewed under an **abuse** of discretion standard. Id; *see also Guardianship of V.S.D.*, 660 N.E.2d 1064, 1066 (Ind. Ct. App. 1996). An **abuse** of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied*. "When findings of fact and conclusions of law are entered by the trial court, we will not set aside the judgment unless it is clearly erroneous; that is, unless we are definitely and firmly convinced the trial court committed error." *Id.* at 599 *citing Lasater v. Lasater*, 809 N.E.2d 380 at 396 (Ind.Ct.App.2004). "In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment." *Balicki v. Balicki*, 837 N.E.2d 532 at 535 (Ind. App. 2005). "Although the facts and reasonable inferences might allow for a different conclusion, the Appellate Court may not substitute its judgment for that of the trial court." *In re Marriage of Bartley*, 712 N.E.2d 537 at 542 (Ind. Ct. App. 1999).

First, the Appellate Court determines whether the evidence supports the findings. *Culley v. McFadden Lake Corp.*, 674 N.E.2d 208, 211 (Ind. Ct. App. 1996). Second, the Appellate Court determines whether the findings support the judgment. *Id.* The trial court's findings and conclusions will be set aside only if they are clearly erroneous. Id. Findings of fact are clearly ***6** erroneous if the record lacks any evidence or reasonable inferences to support them. *Id.* The judgment is clearly erroneous if it is unsupported by the findings of fact and conclusions which rely on those findings. *Id.* In determining whether the findings or judgment are clearly erroneous, we consider only the evidence most favorable to the judgment and all reasonable inferences flowing therefrom. *Hinkley v. Chapman*, 817 N.E.2d 1288 (Ind. Ct. App. 2004); *Gunderson v. Rondinelli*, 677 N.E.2d 601, 603 (Ind. Ct. App. 1997). The Appellate Court will not reweigh the evidence or judge the credibility of the witnesses. *Gunderson*, 677 N.E.2d at 603 Rather, the Appellate Court must accept the ultimate facts as stated by the trial court if there is evidence to sustain them. *Yates-Cobb v. Hays*. 681 N.E.2d 729, 733 (Ind. Ct. App. 1997).

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT AND ORDER OF JUNE 16, 2009 ARE CORRECT AND ADEQUATE AND SHOULD BE UPHELD THEREFORE REQUIRING JERRY BORTKA TO REIMBURSE THE GUARDIANSHIP ACCOUNT FOR $12,034.00.

The trial court did not **abuse** its discretion in ordering Jerry to reimburse the guardianship account. The trial court's findings of fact and conclusions of law are sufficiently clear and adequate and should be upheld. Indiana statute requires that a guardian observe the standards of care and conduct applicable to trustees while protecting, preserving and conserving any property of the protected person in excess of the protected person's current needs. IC 29-3-8-3. The guardian's duty is to manage the ward's estate with the judgment and care that a person with prudence, discretion and intelligence would exercise in the management and care of his own property. The facts before the trial court were sufficient to support the Court's decision that Jerry is responsible for reimbursing $12,034.00 to the guardianship account for failing to act according to his duties as guardian over the guardianship estate of his son, John. The trial court based the monetary award upon issues extensively addressed in its July 17, 2008 Order. ***7** (Appellant's App. p. 7, ¶ 5; Appellee's App. pp. 1-4). The court properly held that Jerry tailed in his duty as guardian. The Court found that Jerry has not fully accounted for the funds that were turned over to him; he allowed John to have apparently unsupervised access to those funds; and Jerry failed to keep guardianship property insured. (Appellant's App. p. 8, ¶¶ 7, 8, 9). As a result, the Court reasonably concluded that Jerry breached his fiduciary duty to the detriment of the guardianship in the amount of $12,034.00. (Appellant's App. pp. 7-9).

A. ***The Evidence Properly Supports the Court's Finding that there was $2100.00 in Unaccounted Funds While Jerry Bortka Was Acting in the Official Capacity of Guardian, Thus the Court's Order Requiring Reimbursement Was Not An Abuse of Discretion.***

The evidence before the Trial court supports its Finding that there was $2,100.00 in guardianship funds unaccounted for by Jerry when guardianship funds were transferred from Paula to Jerry during his tenure as guardian. When the assets were transferred from Paula to Jerry, once he became the guardian over John's person and estate, Jerry initially received $20,000.00 from Paula. (Appellant's App. p. 143). Jerry's accounting showed a deposit of $16,500.00 into the money market account on March 1, 2007. (Appellant's App. p. 223). This account then shows transfers to the guardianship checking account. (Appellant's App. pp. 223-229). That checking account notes two deposits as being transfers from the money market account, one for $1,000.00 on March 1, 2007 and $400.00 on March 9, 2007. (Appellant's App. p. 163). There is no record in the money market accounting of such transfers being made from that account to the checking account. The trial court used its discretion by giving credit to Jerry that these were in fact guardianship funds even though not clearly accounted for. (Appellee's App. p. 2). That being said, there still remains the $2,100.00 in guardianship funds unaccounted for ($20,000.00 less $16,500.00, less $1,000.00, less $400.00). (Id.; Appellant's App. pp. 143, 223). The Court in its Order on the Motion to Correct Errors gave Jerry further ***8** opportunity to explain this difference. (Appellant's App. p. 8, ¶ 7). Jerry did not provide any further evidence to support this difference in funds. (Id.).

Apparently, Jerry now argues that the Trial court erred in holding him responsible for the missing $2,100.00 simply because he, with the aid of his current wife who is a branch manager of a bank, presented a detailed accounting with all cancelled checks, account statements, etc. (Appellant's Appendix p. 90). In essence, he argues that he provided a more detailed and better accounting than Paula had prepared. (Appellant's Am. Brief p. 7). There is nothing requiring a guardian to provide all “raw” data with their accounting. Only if there is an objection by another party to the guardianship accounting or request by the Court is it necessary for a guardian to provide all cancelled checks, specific account statements, etc. Regardless of the details of the **financial** data presented in his accounting, that alleged “detail” failed to account for 2,100.00 in guardianship funds. Plain and simple, his accounting does not add up. As acting guardian during the time period in which those funds are unaccounted for, Jerry (even with the help of his wife who is bank branch manager) is personally responsible. The trial court compared the accounting provided by Jerry with the funds provided to Jerry by the prior guardian, Paula. (Appellee's App. p. 2). Using the evidence presented by the parties, the Trial court properly concluded that $2,100.00 of guardianship funds were unaccounted for from the time the funds left Paula's control through the date Jerry finally submitted an accounting.

The trial court also found that there were bank charges in the amount of $334.00 for overdraft amounts. (Appellant's App. pp. 173-174). The trial court further found that an account properly supervised on a minimal level would have been able to avoid the $334.00 in overdraft bank charges. (Appellant's App. 8, ¶ 7). The Court is not stating that the accounting was prepared incorrectly, but that the accounting itself supports the position of missing funds, It ***9** would be an **abuse** of discretion if the Trial court did not require Jerry to reimburse the guardianship for all funds unaccounted for during his control as guardian. Therefore, it was within the discretion of the Trial court to order Jerry to reimburse his son's guardianship account.

B. ***The Trial court Acted Within Its Discretion When It Ordered Jerry Bortka To Reimburse The Guardianship for $5600.00 in Unauthorized Withdrawals Made By the Ward While He Was Acting As Guardian.***

The trial court found that through the end of 2007, the ward made withdrawals from the account in excess of $5,600.00. (Appellee's App. p. 2). The withdrawals are noted in Jerry's accounting as “personal expense: John withdrawal”. (Id.; Appellant's App. pp. 166-176). Based upon the evidence presented, the trial court assumed these to be situations where John withdrew money without any supervision by Jerry. (Appellee's App. p. 2; Appellant's App. p. 8, ¶ 8). The Court further noted that the evidence was that John may have spent some of this money at night clubs featuring nude dancing and other questionable withdrawals that the Court would not detail further. (Id.).

The Court affirmed its prior findings in the July 17, 2008 Order with its June 16, 2009 Order that is the subject of this appeal. The Court extensively reviewed the accounting made by Jerry when making its original finding. (Appellee's App. pp. 1-4). The Court limited its finding to only those withdrawals from the account that were by John alone and are not any expenditure to or on behalf of John by Jerry. (Appellant's App. p. 8, ¶ 8). The Court did not even include unknown ATM withdrawals and only included withdrawals that were reflected in Jerry's accounting as "Personal expense: John Withdrawal". (Id.). The Court, in its discretion, found these amounts to be unreasonable and given the evidence that John was unable to manage his **financial** affairs should have been closely monitored by Jerry. (Id.). In further support of ***10** upholding its prior Order as reasonable, the Trial court found that in the month of April 2007 alone, these unsupervised withdrawals totaled $1,865.50. (Id.; Appellant's App. pp. 181, 183).

In support of the unauthorized withdrawals, Jerry argues that he had never received any guidance on setting up a guardianship account. (Appellant's Am. Brief p. 8; Appellant's App. p. 55). However, he argues on page 7 of his Am. brief to this Court that he reasonably delegated the preparation of the accounting to his wife, who worked as the branch manager of a bank and thus had specialized knowledge regarding the preparation of **financial** statements. (Appellant's Am. Brief p. 7; Appellant's App. 95). It is difficult to believe that Jerry had absolutely no access to anyone to guide him through the initial setup and **financial** operations of a guardianship bank account--when his wife apparently had enough bank experience to prepare the guardianship accounting. Even if his wife did not have specific experience with the operation of a guardianship bank account, one could safely assume that as a branch manager she could have directed Jerry to a proper bank employee or department within the bank holding the guardianship funds to request the necessary guidance.

There is also a contention that the Court somehow **abused** its discretion by allowing some withdrawals by John, but not others. Again, the Trial court only included amounts that had absolutely no description or reasoning for the withdrawal and/or payment on John's behalf. Paula agrees with Jerry that a few of the withdrawals as set forth in the Jerry's accounting do in fact list funds for window tinting; however, those funds are not included in the $5,600.00 Jerry was ordered to reimburse to the guardianship account. (Appellant's Am. Brief p. 7; Appellant's App. pp. 153-267). Paula has neither denied John the funds to run a window tinting business, nor testified that the use of some funds for window tinting is improper. Lastly, Jerry argues that during the pending guardianship John was paid via check directly by Paula's previous attorney ***11** for a window tinting job that John performed at the attorney's office, and because of that single act of direct payment, the Trial court was acting erroneously when it ordered Jerry to reimburse the guardianship estate due to his failure to adequately supervise John when he was allowed access to $5,600.00 in unauthorized withdrawals. (Appellant's Am. Brief p. 8). The determination of Paula's prior attorney to pay John directly does not create a fact so detrimental that its existence supersedes all other evidence reviewed by the court when reaching its conclusion that Jerry should reimburse the guardianship for these unauthorized withdrawals.

Moreover, the court record from the May 5, 2009 hearing reflects that Paula's attorney addressed the court directly on this issue and informed the court and Jerry's new counsel (his current Appellate counsel) that John's window tinting job at his office was known by all parties and counsel at the time the job was completed. (Appellant's App. p. 99). Paula's counsel further stated that the reason he paid John directly for the job was that while John was at his office in preparation for the tinting job, he observed and heard Jerry yelling at John during a phone conversation which he understood to surround John's inability to get funds to purchase the tinting supplies for the job. (Appellant's App. p. 100). Nothing in the record establishes a wrongful intent by Paula's attorney to pay funds to John directly, and this one-time payment was solely done to facilitate John's ability to purchase tinting supplies. "Although the facts and reasonable inferences might allow for a different conclusion, the Appellate Court may not substitute its judgment for that of the trial court." *In re Marriage of Bartley*, 712 N.E.2d 537 at 542 (Ind. Ct. App. 1999).

Findings of fact are clearly erroneous if the record *lacks any evidence or reasonable inferences* to support them. *Id.* (emphasis added). In determining whether the findings or judgment are clearly erroneous, we consider only the evidence most favorable to the judgment ***12** and all reasonable inferences flowing therefrom. *Hinkley v. Chapman*, 817 N.E.2d 1288 (Ind. Ct. App. 2004); *Gunderson v. Rondinelli*, 677 N.E.2d 601; 603 (Ind. Ct. App. 1997). The Appellate Court will not reweigh the evidence or judge the credibility of the witnesses. *Gunderson*, 677 N.E.2d at 603.

Jerry further argues that the Trial court **abused** its discretion by imposing a substantial loss of freedom on John, which he predictably rebelled against. (Appellant's Am. Brief p. 10). While the section 29-3-8-3(4) of the Indiana Code does state that guardians should encourage self-reliance and independence, it does not stand for the proposition that any ward that is "hard headed" and "extremely independent" as Jerry describes John (Appellant's Am. Brief p. 9; Appellant's App. p. 87), should be released from the guardianship and allowed full access to his **financial** affairs when his injuries and past performance support otherwise.

Jerry chooses to rely on a Tennessee Court of Appeals case to support his contention that he was acting in John's best interest in allowing him personal freedom and autonomy when he allowed unsupervised access to the guardianship bank account. The facts in *In Re Conservatorship of Groves*, 109 S.W.3d 317, 327-328 (Tenn. App. 2003), are not directly on point to the case at bar. In *Groves* the Court of Appeals does briefly cite *Cruzan v. Director. Mo. Dep't of* Health, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) for the proposition of an adult person's right to autonomy, but goes on to focus on the facts surrounding the ward who was an **elderly** adult whom the Court of Appeals found to be incapable of managing her own **financial** and personal affairs. *Id.* The Court of Appeals in *Groves* further concluded that "When viewed as personal power, autonomy takes on added significance to **elderly** persons, many of whom fear the loss of their independence and their ability to control their own lives. *Id.*

***13** Jerry had knowledge that John had personally signed bank withdrawal statements releasing money and that the rehab facility couldn't contain John any longer. (Appellant's Am. Brief p. 9; Appellant's App. pp. 72, 180, 183, 186, 189). He also knew that John was battling a drug addiction. (Appellant's Am. Brief p. 10; (Appellant's App. pp. 56, 79). However, in the same sentence of his brief Jerry states that he tried to provide love and guidance to John. (Appellant's Am. Brief p. 10). If Jerry believed that he could not control John's independent behaviors and had recurring issues with drug addiction, and had actual knowledge that John was personally signing bank withdrawals without his supervision, Jerry had two choices: either relinquish his rights as guardian and request that the court order a replacement, or uphold his duties as guardian to take necessary steps with the **financial** institutions to protect the guardianship funds from John's unauthorized access, before thousands of dollars were spent.

The trial court found that John has exhibited very poor judgment and compulsive behavior. (Appellee's App. pp. 1-4). However, the trial court also touched upon the issue of an individual's freedoms, when it in its order of July 17, 2008 found that not every circumstance where a person is in need of further treatment or assistance, or where the person exhibits poor judgment justifies the granting or continuation of a guardianship. (Id.). As a result of the evidence before it, the trial court terminated the guardianship of John's person because it "is no longer practical"; since "John had demonstrated an inability to handle his money" the Court did not terminate the guardianship over John's estate. Id.).

C. *The Facts and Law Support the Trial court's Valuation of the Vehicle, Therefore The Court's Order Requiring Reimbursement was Not An Abuse of Discretion.*

Review of a trial court's decision in ascertaining the value of property is an **abuse** of discretion standard. *Goossens v. Goossens*, 829 N.E.2d 36 at 38 (Ind. App. 2005). If the trial ***14** court's valuation is within the range of values supported by the evidence, the court does not **abuse** its discretion. *Id.*; *Balicki v. Balicki*, 837 N.E.2d 532 at 536 (Ind. App. 2005). Because the judge has discretion to determine what he believes is the proper valuation of a vehicle based upon the facts in evidence; it is not an **abuse** of discretion to diverge from Jerry's value of the automobile.

On December 25, 2007, John was driving his Nissan Pathfinder when the vehicle collided with a deer, resulting in total loss to the Pathfinder. (Appellant's App. p. 24). The Trial court ordered for Jerry to reimburse the guardianship estate for the lost value of the vehicle due to the fact that Jerry, while acting as guardian, failed to maintain proper automobile insurance on the vehicle by allowing the policy to lapse (Appellee's App. p. 3; Appellant's App. p. 8, ¶ 9). It appears that Jerry does not appeal the Trial court's Order that he reimburse the guardianship estate for the value of this vehicle, but merely objects as to the Court's discretion in calculating the vehicle's value on the date of the accident. (Appellant's Am. Brief pp. 10-11).

The best evidence available to the Court at the original hearing on May 21, 2008 was the $1,200.00 in cash paid for the vehicle on May 22, 2007 and the trade-in value of the jet ski of $6,800.00, which resulted in the Court's valuation of the vehicle at 8,000.00. All parties had agreed at the prior hearing that the evidentiary issues were to be presented in summary fashion by counsel. (Appellee's Appendix p. 2; Appellant's App. pp. 8, ¶ 9, 27-28). The Court received additional evidence at the May 5, 2009 hearing from Jerry that the vehicle was a 1992 Nissan Pathfinder with high mileage. (Appellant's App. p. 45). Jerry submitted a Kelly Blue Book online report for the value of this vehicle as of May 5, 2009 being $1,150.00. (Appellant's App. pp. 151-152). Jerry's Kelly Blue Book value was based upon the May 5, 2009 value of a similar vehicle, not the value as of the date the vehicle was totaled in the accident on December 25, ***15** 2007. The trial court allowed the Kelly Blue Book exhibit but stated that it would give it the weight it believed it was deserved given the fact that the valuation represented two years after the relevant date of the vehicle loss in question. (Appellant's App. p. 48). Based upon all of the evidence before the Court, the value of this subject uninsured vehicle was in the range of $1,150.00 (the value of a comparable vehicle on May 5, 2009) to $8,000.00 (the value claimed by Paula based upon the original purchase price of $1,200.00 plus trade-in value of the jet ski). Based upon this range of values offered by both parties, the Court made an adjustment to its previous finding and valued the vehicle as $4,000.00. (Appellant's App. p. 8, ¶ 9).

Jerry relies upon the case of *Nill v. Nill*, 584 N.E.2d 602 (Ind. Ct. App. 1992), for his argument that the Trial court clearly erred and **abused** its discretion in placing a value on the vehicle. (Appellant's Am. Brief p. 11). The *Nill* case was a divorce action wherein the Trial court awarded each party the personal property in their possession, which was found to be of "approximately an equal value and the principal value of which lies, not in an economic sense, but in their use." *Id.* at 604. The husband argued on appeal that the trial court ignored the value of this property in computing the total marital estate subject to division. *Id.* The wife opined that the husband's personal property was valued equally; however, the summary of assets listed the wife's personal property had a value of $12,125 greater than the property of her husband. Since the statues requires a trial court to equally divide the property in a dissolution action, the Court of Appeals concluded that the court had erred in not considering the value of the personal property in making its division, since it focused on the equal "Use" of the property. *Id.*

Unlike *Nill*, the case at bar is not a dissolution matter concerning the statutory requirement to divide the property equally. In addition, the trial court overseeing this guardianship matter did place a value on the subject vehicle based upon the evidence before it, ***16** just not a value that Jerry agrees with. Both Paula and Jerry presented evidence as to their valuation of the subject vehicle, and the court did not **abuse** its discretion when it reached a valuation in the middle of the offered values.

Moreover, Jerry further relies upon the case of *Jordan v. Talaga*, 532 N.E.2d 1174, 1187 (Ind. Ct. App. 1989), to support the proposition that the measure of damages for personal property is the fair market value of the property at the time of its damage or destruction. (Appellant's Am. Brief p. 11). The quotation relied upon is not a conclusion by the Court of Appeals, but a mere reference to a proposed Jury Instruction offered by a party during the trial in that matter. That being said, Jerry's argument that the trial court improperly relied on evidence of the purchase price of the subject vehicle, which included the trade-in value of a non-automobile jet ski, is without merit.

If Jerry wants to rely on the proposition that the fair market value of property is its value as of the date of the damage and/or loss, then his own offered evidence is meaningless, since he offered the alleged value of a similar vehicle as of the date of the hearing on May 5, 2009 -- which is one and a half (1 1/2) years after the date of loss. (Appellant's Am. Brief p. 11; Appellant's App. pp. 151-152). However, in its discretion, the Trial court reviewed the evidence offered from both parties in determining the value of the damaged vehicle. Paula offered evidence that the vehicle was worth $8,000.00 because that was the alleged purchase price of the vehicle, and Jerry offered the value of the vehicle as of the date of the final hearing. (Appellee's App. p. 2; Appellant's App. pp. 28, 151-152). It is not uncommon for a the total purchase price of a vehicle to be paid in part by cash and a trade-in value of some other piece of property, whether that trade-in property be another automobile, motorcycle, boat or jet ski. A seller of an automobile would be able to reach a conclusion of the trade-in property's value in order to ***17** determine how much it applies towards the total purchase price. In this case, Paula contends that the vehicle was valued at $1,200 in cash and the trade-in value of the jet ski (valued at $6,700) for the remainder of the selling price. (Appellee's App. p. 2; Appellant's

App. p. 28). Jerry had the opportunity to present his own evidence as to the value of the vehicle, which he did in the form of a Kelly Blue Book online valuation report. (Appellant's Appendix pp. 151 -152).

The Trial court properly used its discretion when analyzing the evidence before it as to the value of the totaled Pathfinder. The court's order valuing the vehicle at $4,000.00, approximately “half-way” between Paula's $8,000.00 value and Jerry's $1,150.00 value is not erroneous, and is the best valuation of the vehicle on the actual date of loss on December 25 2007.

II. THE TRIAL COURT'S ORDER OF JUNE 16, 2009 AFFIRMING IT'S PRIOR ORDER OF JULY 17, 2008 REQUIRING JERRY BORTKA TO PAY $2,000.00 TO PAULA BORTKA FOR ATTORNEYS FEES AS A SANCTION FOR JERRY'S CONTEMPT IS CORRECT AND NOT AN ABUSE OF DISCRETION BY THE COURT.

The Order requiring Jerry to pay Paula $2,000.00 for attorneys fees is not an **abuse** of discretion by the Trial court. Paula's claim to the Trial court for attorneys fees was due to actions taken by Paula to enforce the previous Court order and review the expenditure of the guardianship assets by Jerry. The Trial court found that the evidence was clear that Jerry did not embrace his duties as guardian and properly supervise his son. (Appellee's App. p. 3; Appellant's App, p. 8, ¶¶ 10, 11). The Trial court also found that Jerry's failure to provide a timely first accounting justifies a finding of contempt. (Id; Appellee's App. p. 4). Based upon the evidence before it, the Trial court determined that “The actions by Paula in this regard have merit” and therefore properly used its discretion to award $2,000.00 in attorneys fees to Paula for the benefit of her attorney. (Appellee's App. p. 3). Based upon the facts before it, the trial court ***18** did not alter its original finding of contempt or its ruling awarding the payment of attorneys fees, when it made its 2009 Order which Jerry is appealing. (Appellant's App. p. 8, ¶¶ 10, 11).

A guardian shall file a written verified accounting with the court at least biennially *unless otherwise directed by the court*. IC 29-3-9-6 (emphasis added). Jerry argues that he should not have had to file an accounting every sixty (60) days; however, what he fails to accept is the fact that the Trial court ordered him to provide more frequent accountings which is clearly within the discretion granted by statute section IC 29-3-9-6. He further argues that the Court should not have required him to provide accountings every sixty (60) days when Paula was not required to do so. (Appellant's Am. Brief, p. 12). Again, the Trial court is authorized by statute to order a guardian to provide more than two accountings per year--at its discretion. It is not an **abuse** of discretion for a court to order one guardian to provide more accountings than a predecessor guardian. There is absolutely no evidence before this court that supports a bias and/or favorable treatment by the Trial court of Paula versus Jerry, and to argue otherwise is completely unfounded.

Jerry also contends that he should not be required to pay $2,000.00 in attorneys fees to Paula's attorney during the guardianship proceedings, in essence because her attorney had already received payment from the guardianship account in an amount of $9,954.64--almost one-fifth (1/5) of the initial $50,000.00 settlement award received from the ward due to his automobile accident. (Appellant's Am. Brief p. 13). Jerry also argues that Paula's attorney excessive fees were a result of multiple, unnecessary pleadings with the court which related directly to his own purported non-compliance with the accounting requirements ordered by the court. (Id.). While it is true that Paula's attorney had to expend additional time and fees on Paula's behalf, it was necessary in order to compel Jerry to comply with the Court's order as to ***19** his provision of an accounting. (Appellee's App. p. 3; Appellant's App. p. 8, ¶¶ 10, 11). The fact that Jerry disagreed with the Court's requirement that he provide accountings every sixty (60) days does not relieve him from doing so, nor does it allow him to raise an argument for the first time as to his dissatisfaction with the accounting requirement in this subject appeal. The only issue Jerry has raised, is his contention that the Trial court **abused** its discretion in ordering him to pay $2,000.00 of Paula's attorneys fees. Jerry cannot for the first time on appeal raise an objection that he should not have been bound by the prior order of the court concerning accounting requirements every sixty (60) days.

In addition, Jerry's argument that Paula's attorney should not receive $2,000.00 from him since her attorney had already claimed fees from the estate in the amount of $9,954.64, should also fail. Jerry attempts to support this argument by showing that $20,181.48 in attorneys fees had already been paid to their attorneys directly from the guardianship estate. (Appellant's Am.

Brief p. 14; Appellant's App. pp. 140-141, 168-169). Although this argument has no merit to support Jerry's position that he should not be required to pay $2,000.00 towards Paula's attorney fees personally as a result of his failure to perform the duties as guardian, he fails to mention that his own attorney during the guardianship proceedings received $10,226.84 from the guardianship estate. Paula's attorneys fees cannot seem excessive when Jerry's own attorney expended greater fees, can they? Regardless of how many attorneys fees were paid by the guardianship estate, the bottom line is that neither Jerry nor Paula objected to the expenditure of these attorneys fees throughout the guardianship. Jerry never raised an objection to the Trial court in any form that he did not want the guardian's attorneys fees paid for by the estate. Although it is true that some courts have recognized the potential for a highly contested guardianship to deteriorate the estate with the payment of excessive attorneys fees, this is not the issue in the ***20** subject case where the payment of fees is being ordered as a sanction. Moreover, Jerry cannot attempt to raise an argument of excessive fees for the first time in this appeal, when no underlying objections were made before the trial court.

Jerry's simple failure to abide by the Trial court's order to provide accountings every sixty (60) days resulted in a finding of contempt. The trial court's decision to order Jerry to pay $2,000.00 in Paula's attorneys fees logically flows from its finding that Paula had to utilize her attorney's services take necessary actions to protect the guardianship estate for her son given the finding of contempt--clearly, not an **abuse** of the court's discretion.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed in whole and Appellee should be allowed recovery of their costs pursuant to Indiana Appellate Rule 67(C).

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